

No. 14,756

IN THE

United States Court of Appeals
For the Ninth Circuit

MARLIN FERRIS GOGGANS, also known as
M. F. GOGGANS,

Appellant,

VS.

RETA OSBORN,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF OF APPELLANT.

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I.

JURISDICTIONAL STATEMENT.

The appellant was adjudged guilty of contempt of court by an Order of the District Court for the Territory of Alaska, Third Division, made and entered on March 15, 1955, and committed to the custody of the United States Marshal in the event he failed to make certain money payments to the appellee, in said order specified. T.R. pp. 46, 47, 48.

The Order adjudging appellant guilty of contempt was made after the conclusion of a hearing on an Order to Show Cause, made on February 23, 1955, wherein and whereby appellant was ordered to show cause why he should not be adjudged guilty of contempt of court for failure to comply with certain orders of said court theretofore made, including an order of November 12, 1954. T.R. p. 43.

The Order of November 12, 1954, required the appellant to show cause why he should not be dealt with for contempt of court, and further directed him to forthwith pay certain specified sums of money to the appellee. T.R. pp. 39, 40.

Notice of Appeal was filed March 16, 1955. T.R. pp. 49, 50.

A supersedeas bond having been filed a stay of proceedings was granted on March 29, 1955. T.R. pp. 50, 51, 52.

The District Court had jurisdiction of the case by virtue of Secs. 35-2-71 to 35-2-76 of the Alaska Compiled Laws Annotated, 1949.

The Appellate Court has jurisdiction by virtue of New Title 28, U.S.C.A. Sec. 1291 and Sec. 1294 (2).

II.

**STATEMENT OF CASE AND
QUESTIONS INVOLVED.**

1.

Facts and Circumstances.

On August 7, 1951, a suit for divorce was filed in the District Court for the Territory of Alaska, entitled,

Reta Osborn Goggans, Plaintiff,

vs.

Marlin Ferris Goggans, also

known as M. F. Goggans, Defendant.

T.R. pp. 3-6.

The plaintiff in said action is now Reta Osborn, the appellee herein, the defendant is the appellant.

On September 27, 1951, the defendant filed his answer and cross-complaint. T.R. pp. 8-17.

On October 2, 1951, the plaintiff filed her answer to the cross-complaint. T.R. pp. 17, 18.

The case was tried on October 29, 30 and 31, 1951, and on the 1st day of November, 1951. A decree was filed and entered on November 30, 1951, whereby the parties were divorced on the ground of incompatibility of temperament. T.R. pp. 33-35.

The parties were married on December 28, 1946, and since January 1, 1947, had been co-partners in business, under the firm name and style of M. F. Goggans Co.

In 1947 their business consisted of a painting contracting business. Since 1947 it consisted of a paint-

ing contracting business and a wholesale and retail paint business.

On November 2, 1951, the parties entered into an agreement for the dissolution of partnership. T.R. 20-29.

By the terms of this agreement the plaintiff, Reta Osborn Goggans, sold to the defendant, M. F. Goggans, all her right, title and interest in and to the partnership business and executed and delivered to him a bill of sale thereof.

In consideration thereof, the defendant, M. F. Goggans, agreed, in addition to other considerations, to pay to the plaintiff, Reta Osborn Goggans, the sum of \$500.00 per month for the period of four years and four months, a total sum of \$26,000, the payments to commence on November 10, 1951. T.R. p. 25.

By the terms of the decree of divorce this agreement for dissolution of partnership was affirmed and adopted as a property settlement between the parties, and, a duplicate original having been filed, was by reference made a part of the decree. T.R. p. 34.

Thereafter, and up to and including August, 1952, Goggans made the payments of \$500.00 per month, a total of \$5,000.00.

In August, 1952, by the terms of a contract with W. P. Fuller & Company he was compelled to surrender all his interest in the M. F. Goggans Co., and deliver possession of the business and assets thereof to Fuller & Company, and thereafter ceased making said monthly payments. T.R. 35, 36.

On November 3, 1954, a hearing was had in the District Court, on an order of the court theretofore made, requiring the defendant, Goggans, to show cause as to why he should not be dealt with for contempt of court. At the conclusion of the hearing on said Order to Show Cause, the trial judge delivered an oral opinion, which was transcribed and appears in the record. T.R. pp. 38-39.

Pursuant to said opinion, the court, on November 12, 1954, made an order adjudging that contempt proceedings did not lie at that time, and further ordering that the defendant pay forthwith to the plaintiff the sum of \$1,500.00 plus certain interest. T.R. pp. 39-40.

Thereafter on February 23, 1955, the defendant having failed to obey the said order of November 12, 1954, an Order to Show Cause was made by trial judge directing the defendant to show cause on March 4, 1955, as to why he should not be adjudged guilty of contempt of court for his failure to comply with the orders of the court entered in said matter, including the order and decree of November 30, 1951, and subsequent orders, including the order of November 12, 1954. T.R. p. 43.

The Order to Show Cause came on to be heard on March 10, 1955, before Judge George W. Folta, District Judge of the First Division of the Territory of Alaska, to whom the hearing of said matter was assigned by Judge John L. McCarrey, Jr., Judge of the Third Division. Judge Folta filed a Memorandum Opinion on said matter on March 14, 1955. T.R. 45-46.

On March 15, 1955, an order was made by Judge Folta adjudging the defendant guilty of contempt of court, and committed to the custody of the United States Marshal. T.R. 46, 47-48.

The decree of divorce, rendered November 30, 1951, did not by its terms state to which of the parties the divorce was granted. However, Conclusion of Law I. is, "That the defendant is entitled to a decree of the Court dissolving absolutely the bonds of matrimony heretofore and now existing between plaintiff and defendant." T.R. p. 32.

2.

Questions Involved and How Raised.

The questions involved on this appeal are,

1: Whether or not the court had jurisdiction to make the Order of March 15, 1955, whereby the defendant was directed to make certain payments of money to the plaintiff or in default thereof, surrender himself to the United States Marshal.

2: Whether or not resort could be had to enforce the provisions of the decree of divorce filed on November 30, 1951, in so far as the same related to the terms of the dissolution of partnership agreement, which was made a part of said decree. The question of jurisdiction was raised by Objection to the Order and Judgment of March 15, 1955. T.R. p. 48.

The question of resort to contempt proceedings to enforce the provisions of the decree is raised on this appeal.

III.

SPECIFICATIONS OF ERROR.

I.

The court erred in making the Order of March 15, 1955, wherein the defendant in a divorce action was adjudged guilty of contempt of court, and committed to the custody of the United States Marshal in the event he failed to make certain cash payments to the plaintiff in said divorce action, as directed in said order of March 15, 1955. T.R. pp. 46, 47, 48.

1. The order of March 15, 1955, was erroneous in that the court had no jurisdiction to make said order for the following reasons.

2. That said order directed the partial payment of a debt created by an agreement for the dissolution of a partnership entered into between the parties on November 2, 1951. T.R. pp. 20-29.

3. That said debt was not a debt in alimony, maintenance or support. That said debt was provable and dischargeable in bankruptcy proceedings, and the defendant was on December 23, 1954, adjudicated a bankrupt, and had included in his schedule of debts and liabilities, the debt owing to plaintiff in said divorce action by virtue of said dissolution of partnership agreement. T.R. p. 44.

4. That resort could not be had to contempt proceedings to enforce the provisions of a property settlement agreement, made in contemplation of a divorce, and which does not provide for the payment of alimony, or for maintenance or support of wife or child.

IV.

ARGUMENT.

The decree of divorce of November 30, 1951, did not direct the payment of alimony, or maintenance or support money.

The plaintiff did not ask for such relief in her complaint.

The dissolution of partnership agreement of November 2, 1951, was simply a property settlement, a contract of purchase and sale, wherein and whereby for a stipulated money consideration, M. F. Goggans bought from Reta Goggans, all her interest in a co-partnership business, theretofore owned by the parties as co-partners.

The divorce decree affirmed the property settlement agreement.

The decree was not a judgment for the payment of money. The debt was created by the agreement, not by the decree. If the agreement had not been made a part of the decree, Reta Goggans would have had the same legal remedies to enforce collection of payments due her under the terms of the agreement, as are accorded to every creditor. That the agreement was affirmed by the court and made a part of the decree gave her no additional remedy.

The decree of divorce together with the property settlement agreement, was not a judgment for money. Even if it were, an execution would have been the proper remedy, not contempt proceedings, at least not until proceedings supplementary to execution had

been invoked and the defendant ordered to make some specific performance, and failed so to do.

“Although there are apparently few cases bearing directly on the point, we think the statement of the law in the Scherr case is supported by the weight of authority and reason.

A decree for alimony differs from an ordinary judgment for money. The latter only determines an amount owing, while the former directly commands the defendant to pay. * * *

To be enforceable by contempt proceedings there must be a definite and unconditional order to pay alimony as such.”

Ridenour v. Ridenour, 24 P. (2d), p. 419 (1-3).

In the paragraph preceding the above quoted excerpt from the opinion, *Tripp v. Superior Court*, 214 P. 252, 253, is quoted to the contrary. In the *Tripp* case the opinion states,

“The court had full power to deal with the matters covered by the agreement and to render its judgment therein, at least to the extent of making proper provision for the support and maintenance of the wife, provided that it were first ascertained that petitioner was guilty of the charges made against him in the divorce action.”
Opinion (1) p. 253.

In the present case it was not ascertained that the defendant was guilty of the charges made against him in the divorce action. On the contrary Conclusion of Law I. stated that the defendant was entitled to the decree. T.R. p. 32.

Divorced husband's agreement to pay wife \$50,000.00 in annual installments held "debt incurred in effecting property settlement" dischargeable in bankruptcy proceedings.

Tropp v. Tropp, 18 P. (2d) 385, syllabus 1. In the *Tropp* case there was an agreement for the payment to the wife of \$250.00 for support and maintenance, and the sum of \$50,000.00 in yearly installments as a property settlement agreement. The whole agreement was embodied into and affirmed by the decree.

By bankruptcy proceedings the defendant was released from the part of the debt which provided for the payment of \$50,000.00 annually in installments, as a property settlement. The trial court held that the property settlement liability was a proven and dischargeable debt in said bankruptcy proceedings, stating in its opinion,

"Taking the agreement by the four corners, it appears that it was essentially an agreement made for the purpose of effecting a property settlement with *provision incidentally made* (italics ours) for maintenance and support of appellant during the time provided for the completion of such property settlement. We are therefore of the opinion that the trial court correctly concluded that the only liability for 'maintenance and support' within the meaning of the Bankruptcy Act was the liability for the monthly payment, and that the remaining liability for the payment of the \$50,000.00 was a 'debt' from which respondent was released."

Tropp v. Tropp, *supra*, Opinion (1, 2) p. 386.

In the present case there was no provision in the dissolution agreement for maintenance and support. The agreement related solely to a property settlement and created a debt dischargeable in bankruptcy. The decision in the *Tropp* case is affirmed in *Fernandes v. Pitta*, 117 P. (2d) 728 (3) 730.

The decision in the *Ridenour* case, *supra*, is strongly affirmed in *State ex rel. Lang v. Superior Court*, 30 P. (2d) 237. Also in *State ex rel. Foster v. Superior Court*, 74 P. (2d) 479.

Orders for payment of alimony can be enforced by contempt proceedings, but other orders for payment of money are not so enforceable.

Commissioner of Int. Revenue v. Tuttle, 89 F. (2d) 112, Opinion (1-6) p. 115.

The appellant appeared in the District Court, J. L. McCarrey, Jr., presiding, on November 3, 1954, upon an Order to Show Cause why he should not be held in contempt of court because of his failure to comply with the decree of November 30, 1951.

Transcript of Opinion T.R. pp. 38-39. In this opinion it was conceded that the decree did not relate to the payment of alimony, that the contempt proceeding did not lie at that time.

This was a virtual dismissal of the contempt proceeding. Nothing else was before the court. Judge McCarrey seems to have taken the view that because there was no specific direction for the payment of money in the decree, he could remedy that defect by an order specifically directing such payment, which

he proceeded to do both in his opinion and in his Order of November 12, 1954. T.R. pp. 39, 40.

Judge McCarrey did not order the payment to be made as alimony, and could not have done so, for that would have constituted a modification of the decree, without notice. The decree contained no provision directing the payment of money, either as alimony, or as payment on the debt.

The appellant, having failed to comply with Judge McCarrey's order of November 12, 1954, and having been adjudged a bankrupt on December 23, 1954, was, on February 23, 1955, ordered to show cause why he should not be adjudged guilty of contempt of court. A hearing on the latter order was had on March 10, 1955, Judge Folta substituting for Judge McCarrey. The matter before Judge Folta had not been pre-determined by Judge McCarrey, as indicated in Judge Folta's Memorandum Opinion, T.R. pp. 45, 46. The only thing determined by Judge McCarrey was that an Order to Show Cause should issue. Judge Folta sat in place of Judge McCarrey, had power to do anything that Judge McCarrey could have done. Judge McCarrey's opinion of November 5, 1954, indicates that upon presentation of the decisions cited to this appellate court, Judge McCarrey would have dismissed the contempt proceeding, which Judge Folta probably would have done had he not mistakenly assumed that to have done so would have been to reverse Judge McCarrey.

CONCLUSION.

It is submitted that the judgment of the trial court should be reversed.

Dated, Anchorage, Alaska,
November 8, 1955.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Appellant.

